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The Contribution of Justice Bastarache to Equality Law

James Hendry

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I. INTRODUCTION

As lawyers, we tend to view majorities and minorities in Supreme Court of Canada reasons for judgment in an instrumental and rather monolithic way. The law is as the majority of the Court states it. Though we may have a fairly good idea about the type of legal materials and principles that will be applied by the various members of the Court, our impression of the individual justices might be described as peripheral. My peripheral impression of Justice Bastarache was that of a solid and careful judge who seemed to work very diligently within the bounds of existing legal doctrine and I cannot say that I had a clear impression of the predilection for the types of legal principles that he would generally use to decide a case, except for his coming out swinging in the area of language rights. When the haze of *stare decisis* cleared and I had this opportunity to examine his Supreme Court legacy in particular, I was left with a confirmation that he was a strong judge who worked thoughtfully within established doctrine to clarify it and who tended to choose legal principles that advanced the liberal thrust of the *Canadian Charter of Rights and Freedoms*[1] toward individual liberty and equality. In some cases, the tension between principles supporting more collective interests becomes quite clear, whether they support specific groups or values such as those that structure the traditional family. I was interested to see how his approach to doctrine and especially the justification for the breach of Charter rights integrated his own thoughtful resolution of the liminal issue of the roles of judge and legislator.

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

Justice Bastarache was appointed to the Court as it was on the verge of a consensus on a legal standard for implementing the Charter equality right[2] and its statutory analogue, anti-discrimination law.[3] Though he did not write the reasons of the Court setting those standards, his reasons for judgment in equality cases show that the legal principles he applied were aimed at a strong implementation of the purpose of the right and quite demanding of the government in justification of a breach. In discussing his contribution to the development of the jurisprudence on equality law, I would like to ground my thoughts in what seems to me to be a very interesting and appropriate theory for Justice Bastarache's work: one that theorizes what a judge does when confronted by the task of implementing an important, short, broad and value-laden constitutional text, a theory that has gained some traction in American academia and one that I came across during a recent period of educational leave in that milieu.[4]

The basic theory is that judges implement such a constitutional provision in two stages. The first involves a determination of the purpose of the provision. This is particularly apposite in Canada given the Court's early determination that it would take a purposive approach to Charter interpretation.[5] The second is the development of doctrine in the form of rules or standards[6] that courts should apply in future cases to determine whether the impugned government action — the subject of constitutional review — meets or falls short of the purpose to such an extent as to render it unconstitutional. I argue that this approach echoes in the reasons for judgment of Canadian judges in equality cases, especially as they wrestle, not so much with the purpose of the equality right, but with the

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[2] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497 (S.C.C.) [hereinafter "*Law*"].

[3] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] S.C.J. No. 46, [1999] 3 S.C.R. 3 (S.C.C.).

[4] R.H. Fallon, Jr., *Implementing the Constitution* (Cambridge: Harvard University Press, 2001), M.N. Berman, "Constitutional Decision Rules" (2004) 90 Va. L. Rev. 1 [hereinafter "Berman"], R.H. Fallon, Jr., "Judicially Manageable Standards and Constitutional Meaning" (2006) 119 Harv. L. Rev. 1274, at 1298 *ff.*, L.G. Sagar, *Justice in Plainclothes: A Theory of American Constitutional Practice* (New Haven: Yale University Press, 2004), at 84-92, M.W.J. Smith, "Popular Metadoctrinalism: The Next Frontier?" (2007) 1 Harv. L. & Policy 507, K. Roosevelt, "Constitutional Calcification: How the Law Becomes What the Court Does" (2005) 91 Va. L. Rev. 1649, at 1658-67.

[5] *Hunter v. Southam Inc.*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, 156 (S.C.C.).

[6] A rule is the simplest way of implementing a provision's purpose. A rule contains all the elements needed to determine whether that legal purpose is met. An example is that those who drive faster than 100 km per hour on a 100 km per hour highway are guilty of an offence. A standard contains a number of factors that require balancing a defined group of exogenous factors to determine whether the legal purpose is met.

standard by which it should be enforced.[7] The theory posits that it is possible to separate purpose and doctrine so that an observer might be able to identify a gap, such that the stated purpose might be over- or under-enforced by doctrine. The idea is that this discrepancy may be adjusted over time, usually based on exogenous considerations that determine the proper fit between purpose and doctrine.

I will discuss these considerations briefly because I think that this theory provides an interesting basis for thinking about the work of a judge, like Justice Bastarache, who in my view joined a Court that was quite clear about the *purpose* of section 15 all along, but that repeatedly stated after its 1995 equality trilogy,[8] that there remained doctrinal differences among members of the Court that had not yet been worked out.[9]

One theorist's list of the considerations that may explain judicial choices of principle that might determine fit between purpose and doctrine contain the following. A legislative history of a failure to treat

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[7] In *Law*, *supra*, note 2, at para. 2, Iacobucci J. wrote:

> Section 15 of the *Charter* guarantees to every individual the right to equal treatment by the state without discrimination. It is perhaps the *Charter*'s most conceptually difficult provision. In this Court's first s. 15 case, *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R 143, at 164, McIntyre J. noted that, as embodied in s. 15(1) of the *Charter*, the concept of equality is "an elusive concept", and that "more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition". Part of the difficulty in defining the concept of equality stems from its exalted status. The quest for equality expresses some of humanity's highest ideals and aspirations, which are by their nature abstract and subject to differing articulations. The challenge for the judiciary in interpreting and applying s. 15(1) of the *Charter* is to transform these ideals and aspirations into practice in a manner which is meaningful to Canadians and which accords with the purpose of the provision.

[8] *Miron v. Trudel*, [1995] S.C.J. No. 44, [1995] 2 S.C.R. 418 (S.C.C.) [hereinafter "*Miron*"]; *Egan v. Canada*, [1995] S.C.J. No. 43, [1995] 2 S.C.R. 513 (S.C.C.) [hereinafter "*Egan*"]; *Thibaudeau v. Canada*, [1995] S.C.J. No. 42, [1995] 2 S.C.R. 627 (S.C.C.).

[9] See, *e.g.*, *Eldridge v. British Columbia (Attorney General)*, [1997] S.C.J. No. 86, [1997] 3 S.C.R. 624, at paras. 54, 58 (S.C.C.), where La Forest J. writes:

> In the case of s. 15(1), this Court has stressed that it serves two distinct but related purposes. First, it expresses a commitment — deeply ingrained in our social, political and legal culture — to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society".
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> . . . . .
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> While this Court has not adopted a uniform approach to s. 15(1), there is broad agreement on the general analytic framework …

See also *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493, at para. 73 (S.C.C.) [hereinafter "*Vriend*"].

certain groups according to their merits and defects in democracy, such as a group's political powerlessness, might lead to doctrine that enforces a stricter application of constitutional purpose. However, judicial recognition of superior legislative institutional competence, for example, in information gathering and concern for higher costs of judicial error, for example, a decision that requires constitutional rather than simply statutory amendment, might increase deference and decrease fit between purpose and doctrine. A broad purpose might lead to a doctrinal choice of standards of increasing complexity, rather than a rule, as the best vehicle for adjusting doctrine to purpose, but perhaps at a cost of greater uncertainty in outcomes and an impact on the relative ease with which the doctrine can be applied by lower courts and government officials.[10] This implementation theory has developed in the American context and the example often used for showing a gap between purpose and doctrine in the constitutional right to equal protection of the laws which merges right with justification, there being no relevant equivalent to section 1 and which, for most applications, with the notable exception of race, and some intermediate scrutiny grounds such as sex, demands rather little of the government by way of justification. Justice Bastarache took an interest not only in equality doctrine, but in the special section 1 justification concerns raised by section 15.

In the study of his equality jurisprudence that follows, we can see a strong resolve to develop, within the *Law* standard, the principle that the distributive power of the law should be used to ensure that groups that have been the victims of non-merit-based decision-making in the past are treated according to their merits. So, I will argue, his reasoning typically builds on what he perceives to be a clear gap between a characteristic of the claimant and proper allocation of the benefit in issue. He builds his highly contextualized approach to section 1 justification on a fully theorized balance between the institutions of judge and legislator that he tailored to section 15.

Perhaps the most important reason for introducing this theory is that it provides a discourse for discussing the perception that the courts' decisions on equality matters fall far short of the potential suggested by the purpose of a right that instantiates the expectation of equal concern and respect for all members of society and actual outcomes in equality cases.

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[10] K. Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2006), at 22-36. See also Berman, *supra*, note 4, at 92-96.

II. THE ROLES OF JUDGES AND LEGISLATORS

Section 15 cases often involve broad questions of social policy. The role of the judge and any constraints on it is particularly important in this context.

Justice Bastarache spoke extra-judicially about the role of judges in applying standards and values that he thought should override the will of Parliament when they define the "underpinnings of a modern, free and democratic society",[11] implying that Parliament, as an institution established by the Constitution, must operate according to constitutional rules. Speaking judicially, he wrote that one of these principles that underlies the proper functioning of our democracy is egalitarianism that should "promote electoral fairness by creating equality in the political discourse".[12]

In *Canada (Attorney General) v. Hislop*,[13] a section 15 case, he joined the Court in saying that "[i]t is true that this Court has the final word on the interpretation of the Constitution."[14] However, he also clearly stated that the Court did not change constitutional purpose, but that the outcomes of its constitutional interpretations did:

> The implication is that the right of same-sex spouses not to be excluded from survivor benefits did not form part of the Constitution until 1999. To put it bluntly, s. 15(1) of the *Charter* did not extend to same-sex couples until this Court said it did. I note that my colleagues are not simply saying that this Court's *interpretation* of the Constitution had changed between 1985 and 1999. If that were the case, it would be sufficient to base their denial of retroactive relief solely on the good faith reliance of the government. Instead, by relying on a critique of the declaratory theory and the "living tree" doctrine, my colleagues assert, in essence, that the Constitution actually changed between 1985 and 1999 and that the claimants, unlike other Canadians, were not entitled to its protection in 1985. Such an approach runs counter to the spirit of the *Charter* and should not be countenanced.[15]

I think that this strong statement, that constitutional interpretations change but the Constitution does not, is indicative of Justice Bastarache's clear understanding of the realities of constitutional implementation in

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[11] M. Bastarache, "The Interpretation of Human Rights: The Challenge" (2001) 50 U.N.B.L.J. 3, at 6 [hereinafter "'Interpretation of Human Rights'"].

[12] *Harper v. Canada (Attorney General)*, [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827, at para. 63 (S.C.C.).

[13] [2007] S.C.J. No. 10, [2007] 1 S.C.R. 429 (S.C.C.) [hereinafter "*Hislop*"].

[14] *Id.*, at para. 156, echoing the majority of the Court, at para. 111.

[15] *Id.*, at para. 146.

recognizing that changes in the sensitivities of constitutional doctrine to exogenous influences, such as objective changes in social context, will close some gaps between constitutional purpose and doctrine over time.

Throughout his time on the Supreme Court bench, Justice Bastarache was concerned about allegations of judicial arbitrariness and activism. I will discuss how this influenced his section 15 and particularly his section 1 analysis as I discuss his decisions. However, extra-judicially, he argued that the constraints of legal text, precedent, judicial respect for its proper function,[16] a limitation of analysis "to the requirements of a rational basis for the legislative choice",[17] common law incrementalism, the rules of statutory interpretation, *stare decisis*, the principles applied to categories of decisions in the past, Charter rights themselves and new sources of legal inspiration, such as the decisions of foreign courts, all would allow the courts to develop the law and control judicial activism.[18] But only the Court would be able to determine whether these considerations achieve the proper balance between the judiciary and legislature.[19] Interestingly, for the theory that I am advancing, he writes that the Court is not free to simply "rewrite the law to secure the effective implementation of the *Charter*".[20] However, the context of this statement is that judges cannot simply do whatever they want. And, while admitting that judges have to define the moral and ethical standards of society in which their beliefs, experience, ideals and values come into play and that judges have a law-making role that is as old as the common law, he adds that judicial accountability comes in the form of public reason-giving, the process of legal decision-making, "the reality of judicial precedent",[21] and contextual and purposive analysis. He denied that there were ideological camps in the Court[22] and spoke against the over-simplification in court-watching that translated into easy categorization of judges.

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16 *Supra*, note 11, at 4.

17 *Id.*, at 6.

18 *Id.*, at 10.

19 *Id.*

20 *Id.*, at 4.

21 M. Bastarache, "Decision-Making in the Supreme Court of Canada" (2007) 56 U.N.B.L.J. 328, at 329-30 [hereinafter "'Decision-Making'"].

22 *Id.*, at 333.

III. SOCIAL JUSTICE

A few months after his appointment to the Supreme Court, Justice Bastarache was asked to speak extra-judicially about affirmative action as an instrument of social justice.[23] While the speech was rather open-ended, I think that it demonstrates a strong sensitivity to equality issues. He contrasted "individual" and "social" justice theories. The former was a negative right to the removal of barriers to individual benefit based on personal characteristics. The latter concerned justice to disadvantaged groups based on the distributive power of the law and the idea that such groups often needed more than the negative right, but rather positive accommodation to overcome past injustice. He tentatively suggested that section 15(2) indicated an aggressive social justice model.[24]

On another occasion, he expressed his concern with the impact that the predictive ability of genetic testing would have on blurring "the line between merit and discrimination based simply on identity"[25] and wondered how "such perfect knowledge [could] be squared with the principle that we all should be treated with equal respect".[26] This not only negatively impacted equality but also had the "capacity to reduce autonomy by quantifying risk to perfection".[27] His views about equality and liberty, as I shall try to point out, synchronize well with the classical liberal nature of the values instantiated in the Charter.

Justice Bastarache may have been influenced in this contrast between individual and group-based social justice by his strong engagement with language law which is collective by its nature. The Court had earlier held that minority language education rights in section 23 of the Charter were group rights.[28] In *R. v. Beaulac*[29] he held that the principle of substantive equality is the norm for Canadian law and for the equality of the official languages in section 16 of the Charter.[30] This might explain the sometime

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[23] M. Bastarache, "Does Affirmative Action Have a Future as an Instrument of Social Justice?" (1997-1998) 29 Ottawa L. Rev. 497.

[24] *Id.*, at 501-502.

[25] M. Bastarache, "The Challenge of the Law in the New Millennium" (1997-1998) 25 Man. L.J. 411, at 417.

[26] *Id.*: "Law is largely dedicated to protecting a sphere in which hope is possible, in which crushingly rational — or supposedly rational — decisions are prevented from shattering the legitimate aspirations of individuals, even if they appear futile."

[27] *Id.*

[28] *Mahe v. Alberta*, [1990] S.C.J. No. 19, [1990] 1 S.C.R. 342, at 365, 369 (S.C.C.).

[29] [1999] S.C.J. No. 25, [1999] 1 S.C.R. 768 (S.C.C.).

[30] *Id.*, at para. 22: "Equality does not have a lesser meaning in matters of language. With regard to existing rights, equality must be given true meaning. This Court has recognized that substantive equality is the correct norm to apply in Canadian law." and *id.*, at para. 24: "This

tension between individual and collective interests in his equality cases. Extra-judicially, he contrasted the American and Canadian approaches to human rights: "[i]ndividual rights are at the centre of their political philosophy while we balance individual and collective rights."[31]

IV. THE PURPOSE OF SECTION 15(1)

Approaching this examination of the work of Justice Bastarache in implementing the equality right, I think that we must start with the original determination of section 15's purpose. He joined the Court almost a decade after McIntyre J. stated the basic purpose of the equality right for the Court in *Andrews v. Law Society of British Columbia*,[32] which was to ensure that all members of society "are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration".[33] The Court thought that this was to be achieved by the accommodation of relevant individual and group difference, so that all members of society obtained the same value of the benefits provided by the law and bore the same burdens of the law. "Substantive equality"[34] soon became part of the Court's lexicon.

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principle of substantive equality has meaning. It provides in particular that language rights that are institutionally based require government action for their implementation and therefore create obligations for the State", citing s. 15 equality jurisprudence. Similarly, in *Arsenault-Cameron v. Prince Edward Island*, [2000] S.C.J. No. 1, [2000] 1 S.C.R. 3, at para. 31 (S.C.C.), he wrote:

> … the object of s. 23 is remedial. It is not meant to reinforce the *status quo* by adopting a formal vision of equality that would focus on treating the majority and minority official language groups alike; see *Mahe*, *supra*, at p. 378. The use of objective standards, which assess the needs of minority language children primarily by reference to the pedagogical needs of majority language children, does not take into account the special requirements of the s. 23 rights holders. The Minister and the Appeal Division inappropriately emphasized the impact of three elements on equality between the two linguistic communities: duration of the bus rides, size of schools and quality of education. Section 23 is premised on the fact that substantive equality requires that official language minorities be treated differently, if necessary, according to their particular circumstances and needs, in order to provide them with a standard of education equivalent to that of the official language majority. Before examining this issue in more detail, however, it is important to deal briefly with the "numbers warrant" analysis which was discussed in both the trial and appeal divisions.

[31] *Supra*, note 21, at 331.

[32] [1989] S.C.J. No. 6, [1989] 1 S.C.R 143 (S.C.C.) [hereinafter "*Andrews*"].

[33] *Id.*, at 171.

[34] According to a CanLII search of Supreme Court cases, this term was apparently used for the first time by L'Heureux-Dubé J. in dissent in *Symes v. Canada*, [1993] S.C.J. No. 131, [1993] 4 S.C.R. 695, at 786 and 820 (S.C.C.) and *Vriend v. Alberta*, *supra*, note 9, at para. 82, *per* Cory J.

But recognizing that of all the distinctions in the law, only discriminatory distinctions in the law breached section 15, McIntyre J. offered a definition of discrimination also still in use today:

> I would say then that discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.[35]

V. *ANDREWS*' DOCTRINE

Justice McIntyre in *Andrews* summarized the doctrinal standard to implement section 15(1):

> The … "enumerated and analogous grounds" approach most closely accords with the purposes of s. 15 and the definition of discrimination outlined above and leaves questions of justification to s. 1. However, in assessing whether a complainant's rights have been infringed under s. 15(1), it is not enough to focus only on the alleged ground of discrimination and decide whether or not it is an enumerated or analogous ground. The effect of the impugned distinction or classification on the complainant must be considered. Once it is accepted that not all distinctions and differentiations created by law are discriminatory, then a role must be assigned to s. 15(1) which goes beyond the mere recognition of a legal distinction. A complainant under s. 15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory.[36]

After *Andrews*, the Court went through a period of adjusting its doctrine to implement section 15, focusing mainly on two strains of discrimination. One strain focused on the impact of the law on already disadvantaged groups, based on the idea that governments had often acted on falsely

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[35] *Supra*, note 32, at 174. See recently *R. v. Kapp*, [2008] S.C.J. No. 42, [2008] 2 S.C.R. 483, at para. 18 (S.C.C.) [hereinafter "*Kapp*"].

[36] *Id.*, at 182.

ascribed personal characteristics leading to the perpetuation of group disadvantage and prejudice. The second strain concerned distinctions based on merit that were less likely to be discriminatory. These included various accommodations of the needs of disadvantaged groups.[37] Both strains are found in McIntyre J.'s section 15(1) application of doctrine.[38]

VI. THE PRE-*LAW* EQUALITY CASES OF JUSTICE BASTARACHE

Justice Bastarache voted with the majority in his first equality case as a Justice of the Supreme Court of Canada in *Vriend v. Alberta*,[39] where the Court held that the failure of the Alberta legislature to protect individuals based on their sexual orientation offended the equality right and could not be justified. Justice Cory applied the "enumerated and analogous grounds" approach whereby a distinction on a ground was almost presumptively discriminatory.[40] I think that it is fair to say that *Vriend* was the high-water mark of this approach as the last major equality case before *Law*.

The next case in which a section 15 issue was raised was *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*,[41] in which

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[37] *R. v. Turpin*, [1989] S.C.J. No. 47, [1989] 1 S.C.R. 1296 (S.C.C.) (murder; accused not a disadvantaged group for s. 15 purposes); *R. v. Hess*; *R. v. Nguyen*, [1990] S.C.J. No. 91, [1990] 2 S.C.R. 906 (S.C.C.) (statutory rape not sex discrimination because the *actus reus* in the crime against young women different from similar crimes against young men); *Weatherall v. Canada (Attorney General)*, [1993] S.C.J. No. 81, [1993] 2 S.C.R. 872 (S.C.C.) (female searches of male prisoners not sex discrimination because circumstances of female prisoners different from males); *Eaton v. Brant County Board of Education*, [1996] S.C.J. No. 98, [1997] 1 S.C.R. 241 (S.C.C.) (child not subject to disability discrimination where decision-maker took her full circumstances into account); *R. v. Swain*, [1991] S.C.J. No. 32, [1991] 1 S.C.R. 933 (S.C.C.) (mentally disabled accused not discriminated against on ground of disability when forced to go through second trial on insanity if they do not raise it at trial because no one may be convicted without *mens rea*); *R. v. S. (S.)*, [1990] S.C.J. No. 66, [1990] 2 S.C.R. 254 (S.C.C.) (young offender not discriminated against on basis of place of residence because he lived in a province that validly opted out of a federal diversion scheme).

[38] *Supra*, note 32, at 183. The Court, including Bastarache J., confirms the dichotomy in *Kapp*, *supra*, note 35, at paras. 18, 77.

[39] *Supra*, note 9.

[40] *Id.*, at para. 91:

> It has been noted, for example by Iacobucci J. in *Benner*, [1997] S.C.J. No. 26, [1997] 1 S.C.R. 358, at para. 69, that: "Where the denial is based on a ground expressly enumerated in s. 15(1), or one analogous to them, it will generally be found to be discriminatory, although there may, of course, be exceptions: see, *e.g.*, *Weatherall v. Canada (Attorney General*), [1993] 2 S.C.R. 872." It could therefore be assumed that a denial of the equal protection and benefit of the law on the basis of the analogous ground of sexual orientation is discriminatory. Yet in this case there are other factors present which support this conclusion.

[41] [1999] S.C.J. No. 5, [1999] 1 S.C.R. 10 (S.C.C.).

Bastarache J. joined with the majority reasons written by Iacobucci J. He rejected a systemic discrimination argument that the laws governing the registration of charities discriminated against visible minority women by withholding registration of the claimant corporation thereby limiting its ability to raise funds for members of the group. His reasoning was that the purposes of the corporation did not meet the uniform definition of charitable purposes and so the personal characteristics of its intended beneficiaries were not engaged.[42]

VII. *LAW* AND THE PURPOSE OF SECTION 15

Justice Bastarache was a member of the Court when it decided that the way to implement the equality right to equal care and concern was through a complex standard.

As noted above, the *Law* Court restated the purpose of section 15 slightly:

> to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.[43]

This restatement drew together a number of disparate considerations that the Court had used to implement section 15 now under a generalized concern for human dignity.

VIII. *LAW* AND SECTION 15 DOCTRINE

The *Law* standard incorporated the enumerated and analogous grounds approach, but attempted to unpack the definition of discrimination from *Andrews*[44] to capture the two strains of discrimination identified in that case in a complex standard meant for judicial application. The new doctrinal "synthesis"[45] involved the addition of a subjective-objective assessment by an informed reasonable claimant of whether the government action was an affront to basic

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42 *Id.*, at para. 208.
43 *Law*, *supra*, note 2, at para. 51 (S.C.C.).
44 *Supra*, note 32.
45 *Law*, *supra*, note 2, at para. 39.

human dignity considering the two strains. Presumably, the idea was to add to the standard, a doctrinal mechanism that would aid courts in identifying the real harm of discrimination comprehensively as a dignity harm captured by four contextual factors that can be grouped according to the two strains of discriminatory action described above.[46] The first was a concern with the perpetuation of disadvantage of an already disadvantaged group in society, the amelioration of such disadvantage and the seriousness and nature of the action's effect on the group. Second, the reasonable claimant was also to take into account whether the action was based on merit: whether it corresponded to the actual nature, capacities and circumstances of the claimant group. In later cases, Justice Bastarache seemed moved to write reasons where this second concern was most descriptive of the equality harm as he saw it. These factors thus balanced the *Andrews* Court's concern with both the perpetuation of the conditions of disadvantaged groups together with the government's failure to consider their merits in the impugned distinction. The *Law* Court expanded on its doctrinal view that section 15 was a comparative right by increasing analytical attention to the choice of comparators.

For the remainder of his time on the Supreme Court bench, Justice Bastarache worked with his colleagues in applying the *Law* standard, until he agreed with his colleagues at the end of his term essentially to re-package the discrimination analysis and dump the legal dignity criterion in *Kapp*.

IX. JUSTICE BASTARACHE'S OWN EQUALITY DECISIONS

Justice Bastarache wrote that his first authored concurrence in an equality case, *M. v. H.*,[47] was driven by his difference with the majority about the purpose of the impugned law that provided for support on the breakdown of opposite-sex relationships.[48] His reasons start with his acknowledgment that judges were to apply the law and not dabble in policy in matters, especially where "emotions run high".[49] With this statement of the judge's constitutional role and by engaging in an unquestioned application of the recently synthesized *Law* standard, he

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[46] Indeed, the Court in *Kapp*, *supra*, note 35, makes this grouping, at para. 23.

[47] [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3 (S.C.C.).

[48] *Id.*, at para. 287.

[49] *Id.*, at paras. 285, 286 and 328.

appears to be following his views discussed above as a judge embracing principles that advanced the fundamental ideals of liberty and equality within the proper judicial confines. His section 15 reasoning is terse and comes right to the point: the text of the family law support law blocked same-sex couples from accessing a legal procedure provided to unmarried opposite-sex couples when their relationships broke down. This failure of correspondence of law to group need was arbitrary and suggested that same-sex unions were not worthy of recognition or protection and was therefore discriminatory.[50] The implementation of constitutional purpose by a strict application of established doctrine seemed simple.

Justice Bastarache's interest in developing section 15 doctrine is seen in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,[51] released the same day as *M. v. H.*, in majority reasons co-written with McLachlin J. (as she then was). Section 77(1) of the *Indian Act*[52] limited the right of band members to vote for the band council to those who lived on reserve. The two justices sought to clarify the nature of the second step of the *Law* standard concerning grounds in two ways: its role as a threshold step in the *Law* standard and that the grounds, whether enumerated or analogous, are "… constant markers of suspect decision making or potential discrimination".[53] Analogous grounds become constitutionalized once recognized. The justices thought that because grounds identify the types of claims that should be subject to the third step of the standard, their use as a threshold avoided a waste of judicial resources on trivial cases falling outside section 15's purpose.[54] The two justices define the considerations for identifying analogous grounds based on what they have in common with the enumerated grounds:

> It seems to us that what … [enumerated] grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity … grounds based on characteristics that we cannot change or that the government has no legitimate interest in expecting us to change to receive equal treatment under the law. To put it another way, s. 15 targets the denial of equal treatment on grounds that are

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50 *Id.*, at para. 291.
51 [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.) [hereinafter "*Corbiere*"].
52 R.S.C. 1985, c. I-5.
53 *Corbiere*, *supra*, note 51, at para. 8.
54 *Id.*, at para. 11.

> actually immutable, like race, or constructively immutable, like religion.[55]

Concern with group disadvantage became a predicate to a concern with the way that governments have historically treated groups without regard to their merit:

> Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.[56]

The repetition of the merit-based decision-making point suggests their strong leaning toward the intuition that the law should accord with the actual needs and circumstances of individuals. The fact that disadvantage has resulted from non-merit-based decision-making based on these characteristics seems to suggest that they thought that to base law on merit would overcome barriers to equal benefit flowing from past disadvantage. I think that this slight change in doctrinal emphasis broadened the scope of section 15 to potentially include claims of non-disadvantaged groups who also suffer from non-merit-based decision-making based on their immutable personal characteristics. In *Corbiere*, "Aboriginality-residence",[57] in the sense of living on- or off-reserve, was important to Aboriginal identity and not easily changed. They wrote that this approach to analogous grounds allowed courts to focus on particular forms of discrimination by defining "embedded" grounds.[58] They clearly identified the third step of the *Law* standard as the locus of analysis of the facts of a particular case. There was a quick mention of the disadvantage suffered by off-reserve band members followed by their main move to focus on the logical driver of the finding of discrimination: off-reserve band members had an interest in the land, culture and resources of their reserve in common with on-reserve members and so they should have an equal right to democratically chosen representation in Band affairs. The impugned law failed to deal with the merits of off-reserve members; it denied them the right to participate in Band

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55 *Id.*, at para. 13.
56 *Id.*
57 *Id.*, at para. 6.
58 *Id.*, at para. 15.

elections, arbitrarily based on a personal characteristic: it presumed that they were not interested in political participation and their cultural identity. It deprived them of their dignity. They went further: even if the off-reserve Band members had freely chosen to live off-reserve and were not subject to discrimination in Canadian society, "they would still have the same cause of action".[59] They would still be deprived of their political and cultural rights. Once again, the law simply did not correspond to need and so was discriminatory. Equal concern and respect was to be achieved then in this case, by recognizing that the *Law* standard consisted of a structured focus by means of a comparison based on grounds relating to immutable characteristics, on disadvantage or on the logic of failure to accord law to need.

I think that Bastarache J.'s plurality reasons in *Lavoie v. Canada*[60] served as another opportunity to fine-tune the doctrinal framework of the *Law* standard, apparently trying to fit the *Andrews* reasoning on the same issue — a citizenship requirement for employment — into the recently synthesized vocabulary of the new standard. As in *Corbiere*, he emphasized the purpose of the first two steps of the equality standard as a legal threshold for the third step where the specific effects of the impugned law are analyzed from the perspective of the reasonable claimant. He applied the *Andrews* determination that citizenship is an analogous ground without question. There was no room for deference or doubt on this point. On a novel point, he was not willing to reject the claim at the threshold stage based on a federalism argument that the Constitution grants the federal government the unassailable right to define the rights of citizens in the same way that section 6 allows it to distinguish between citizens and non-citizens for immigration purposes in *Canada (Minister of Employment and Immigration) v. Chiarelli*.[61] He affirmed that the purpose of a Bill of Rights was to analyze differential treatment here in terms of equality rights and not in terms of division of powers, so a comparison of groups based on jurisdictional considerations at the threshold stage was inappropriate. However, he ventured that federal laws based on "alienage"[62] might survive the third contextual stage of the *Law* standard, lumping *Law* itself in with this genre of case. Presumably he meant that a distinction on a ground in a federal law may not be discriminatory if the distinction in the law on a ground is dictated

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59 *Id.*, at para. 19.

60 [2002] S.C.J. No. 24, [2002] 1 S.C.R. 769 (S.C.C.) [hereinafter "*Lavoie*"].

61 [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711 (S.C.C.).

62 *Supra*, note 60, at para. 40.

by the constitutional division of powers. It is interesting that in *R. v. S. (S.)*,[63] which he does not mention in *Lavoie*, the Court held that the discriminatory potential of provincial differences in the application of a provincial young offenders program was eliminated at what would, under the *Law* standard, be the third stage, by reference to federal values.[64]

The issue of discrimination in *Lavoie* was governed by *Andrews*. Justice Bastarache stated that the Court's earlier finding that non-citizens were a disadvantaged group was final and binding for the future.[65] Presumably this is to be consistent with his shared reasoning in *Corbiere* that analogous grounds are grounds for all time and all purposes and what I think was meant by the idea of embedded grounds as an indication that they were to be sharply focused, unlike the broad enumerated grounds. The close connection between historical patterns of disadvantage and analogous grounds that made the grounds useful markers for further scrutiny would be disrupted if the factual finding of the disadvantaged nature of the group varied from case to case. He used the "suspect markers"[66] vocabulary again, almost inferring that distinctions on such grounds were presumptively discriminatory,[67] leaving the ultimate determination of discrimination to the third stage of the *Law* standard.

Once again, Bastarache J. emphasized the requirement that the law correspond to the merits of the claimant group in comparison to the merits of others. He crossed swords with Marceau J. in the court below who, he writes, accepted the principle that federal citizenship-defining laws would not be discriminatory because the use of federal legislative jurisdiction over citizenship rights and status in this case did not discriminate against non-citizens. Justice Bastarache had a different view of whether this correspondence was a proper merit-based argument. He traced the origin of the concern that the law correspond with group need to the principle of accommodation of the needs of the disabled and women to achieve substantive equality.[68] He generalized that this was to ensure that governments accommodate the particular situation of those affected by their actions, including any relative advantage or disadvantage.[69] This

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[63] [1990] S.C.J. No. 66, [1990] 2 S.C.R. 254 (S.C.C.) [hereinafter "*S. (S.)*"].

[64] *Id.*, at 288.

[65] *Lavoie*, *supra*, note 60, at para. 45.

[66] *Id.*, at para. 41.

[67] This flows through into the *Kapp* standard, as the point at which a court is supposed to determine whether it proceeds with a s. 15(1) or a s. 15(2) analysis, see *Kapp*, *supra*, note 35, at para. 40.

[68] *Supra*, note 60, at para. 42.

[69] *Id.*, at paras. 43-44. See also *Law*, *supra*, note 2, at para. 70.

included, it seems, disability and gender as difference based on "actual personal differences between individuals".[70] However, in this case, citizens and non-citizens were similar in their "sociological, economic, moral, [and] intellectual"[71] merits. Citizenship was only a legal status which this law need not accommodate. Further, the distinction perpetuated the disadvantage of non-citizens without taking their merits into account in the same way as in *Andrews* and did not ameliorate their lot.

One of the most interesting doctrinal developments in Bastarache J.'s *Lavoie* reasons lies in his elaboration of the objective-subjective viewpoint of the reasonable claimant from which distinctions must be evaluated according to the *Law* standard. He borrowed carefully from the terminology of the *Law* case, in saying that what the viewpoint idea requires is a contextualized look at how a non-citizen "legitimately feels when confronted with a particular law".[72] In one of the most empathetic applications of the reasonable claimant test by the Court, he wrote that even though a non-citizen would probably recognize that the citizenship preference in issue had nothing to do with his or her own merits, he or she might still feel less worthy of the government's respect and concern.[73] In making the point that the section 15 and section 1 analyses

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[70] *Supra*, note 60, at para. 44.

[71] *Id.*

[72] *Law*, *supra*, note 2, at para. 53.

[73] *Lavoie*, *supra*, note 60, at para. 46. Showing a similar concern for the phenomenology of the law, Bastarache J. added his name to the rest of the Justices who decided *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.J. No. 39, [2005] 2 S.C.R. 100 (S.C.C.) when discussing s. 319 of the *Criminal Code*, R.S.C. 1985, c. C-46, which prohibits inciting hatred against identifiable groups. He and the other Justices emphasized, at paras. 102-103, the subjective, expressive harms of discriminatory expression in context:

> The offence does not require proof that the communication caused actual hatred. In [*R. v.*] *Keegstra*, [[1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.)] this Court recognized that proving a causal link between the communicated message and hatred of an identifiable group is difficult. The intention of Parliament was to prevent the risk of serious harm and not merely to target actual harm caused. The risk of hatred caused by hate propaganda is very real. This is the harm that justifies prosecuting individuals under this section of the *Criminal Code* (p. 776). In the *Media Case*, [*Prosecutor v. Nahimana, Barayagwiza and Ngeze*, Case No. ICTR-99-52-T (Trial Chamber I) (December 3, 2003)] the ICTR said that "[t]he denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm" (para. 1072).
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> Although the trier of fact engages in a subjective interpretation of the communicated message to determine whether "hatred' was indeed what the speaker intended to promote, it is not enough that the message be offensive or that the trier of fact dislike the statements: *Keegstra*, at p. 778. In order to determine whether the speech conveyed hatred, the analysis must focus on the speech's audience and on its social and historical context. An abstract analysis would fail to capture the speaker's real message.

should not be elided, he nuanced the required judicial stance when he wrote that the "… subjective view must be examined in context, that is, with a view to determining whether a rational foundation exists for the subjective belief"[74] and not by balancing individual and state interests. Justice Bastarache refused to acknowledge that the focus on dignity made the section 15 test amorphous.[75]

The *Lavoie* case also shows an interesting contrast between Bastarache J.'s working within the established equality standard and Arbour J.'s attempted re-conception of equality doctrine, where she attempted to embrace a tension between the comparative concerns of the groups involved on the one hand and the public interest on the other, involving what she theorized as a bilateral nature of rights.[76] Justice Bastarache rejected this re-conception on various grounds. Contrary to Arbour J.'s position, he wrote that public policy reasons should not undermine an equality claim. Such balancing should not be done within the right without the sort of textual mandate of section 7. Her approach departed from earlier section 15 jurisprudence. Also, her focus on the disadvantage of the individual claimants as opposed to the group with which they are associated by a personal characteristic could be invidious in other cases.

I think that Bastarache J.'s strong commitment to the doctrinal principle of the need for correspondence between law and reality is seen most clearly in *Nova Scotia (Attorney General) v. Walsh*,[77] in which he wrote for the majority of the Court, holding that the exclusion of opposite-sex unmarried couples from the matrimonial property scheme in Nova Scotia family law did not breach section 15. He readily accepted the concession of the Crown that the exclusion was differential treatment on the analogous ground of marital status established in *Miron*, noting the finding of McLachlin J. (as she then was) in that case that distinctions between married and unmarried couples were based on that ground because they violated dignity, imposed group disadvantage and created the danger of stereotypical group-based decision-making.[78] However, in *Walsh*, Bastarache J. thought that the examination of the issue must be based on the merits of the relationships involved. The driver for him was that the Court could not presume that unmarried couples entered their

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74 *Lavoie*, *supra*, note 60, at para. 46.
75 *Id.*
76 *Id.*, at para. 88.
77 [2002] S.C.J. No. 84, [2002] 4 S.C.R. 325 (S.C.C.) [hereinafter "*Walsh*"].
78 *Supra*, note 8, at para. 156.

relationship accepting all of the legal obligations of marriage. Proof of functional similarities between married and non-married couples was not very relevant in this context. Rather, there was a fundamental difference between these classes and even within the class of unmarried couples itself, in the freedom that the latter group had to choose how to structure their relationships economically. He accepted that unmarried couples have suffered historical disadvantage, including the fact that they might not have a real choice to get married where one of the partners refuses, citing a discussion in *Miron* where L'Heureux-Dubé J. notes the fact that the lack of choice is often illusory.[79] However, his focus is on the fact, also noted in *Miron* by L'Heureux-Dubé J., that many unmarried couples choose to avoid the legal consequences of marriage (while her point had been that a focus on "unfettered choice"[80] alone could disadvantage women).[81] He thought that bringing the power of the state to bear by forcing a matrimonial regime on unmarried couples nullified their choice of an alternative family form and to have that choice respected by the state. Further, the legislative record and associated case law showed that the matrimonial regime was meant to remedy the wrongs inflicted in the past on women in a separate property regime by recognizing marriage as an economic partnership and by protecting a non-title-holding spouse. He was concerned that the weighty burden of the scheme for married couples should not be placed by the state on unmarried couples who might not want it because they still had numerous ways of duplicating the matrimonial regimes for themselves if they wanted to by marriage, domestic contract or registration as domestic partners. Thus, in the matrimonial property law there was correspondence of law to the choice of married couples and to the liberty created by the range of choice available to unmarried couples to decide how to deal with their property. Unlike *Miron*, which dealt with third-party state treatment of married and unmarried couples, this case concerned the relationship of the parties between themselves. The key point was that Bastarache J. thought that choice, a function of the autonomous liberal legal subject, trumped whatever disadvantage existed within unmarried couples. He thought that this was consistent with the liberty value underlying the Charter.[82]

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79 *Supra*, note 77, at para. 42, citing L'Heureux-Dubé J. in *Miron*, *id.*, at para. 102.

80 *Miron*, *id.*, at para. 100.

81 *Id.*, at paras. 97-102.

82 *Supra*, note 77, at para. 57.

Justice Bastarache dissented in the controversial case of *Gosselin v. Quebec (Attorney General)*,[83] in which a class of welfare recipients under 30 complained that the workfare conditions that were imposed on them to obtain the welfare benefits received by those over 30 plunged them into deepest poverty. In opening his section 15 analysis, he once again demonstrated his interest in the function of grounds within section 15, which are often used as an "illegitimate proxy for merit".[84] Unlike other judicial conceptions of age discrimination that are based on the deferential idea that such discrimination is unlikely because we all pass through all ages, he thought the issue was not so simple. Rather, he thought that age should not be the subject of deference because large age cohorts might still discriminate against smaller ones based on changing circumstances over time.[85] Once again working within the doctrine of section 15, he clarified that a distinction on a ground does not create a presumption of discrimination, but rather a "strong suggestion".[86] The legislation here had to be examined in light of its purposes and effects.

Unlike the members of the majority, he thought that the impugned distinction should be considered in the welfare context, where the facts showed that it was not as easy for those under 30 to right themselves economically as the younger group of claimants in *Law* and that the government's creation of the program in issue showed that it was aware of this, even though there was no evidence that younger persons on welfare have traditionally been disadvantaged. The welfare context made the affected group more disadvantaged than others on the same ground.[87]

Justice Bastarache found the lack of correspondence between law and need compelling, while noting that this inquiry should not displace a section 1 inquiry. The program did not ameliorate the condition of those under 30.[88] Focusing once again on the driving logic of the case, he found that the beneficial long-term purpose of the program simply did not outweigh its effects in failing to deal with the present need of all welfare claimants for minimum support.[89] Legislative difference can only

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[83] [2002] S.C.J. No. 85, [2002] 4 S.C.R. 429 (S.C.C.) [hereinafter "*Gosselin*"].

[84] *Id.*, at para. 226.

[85] *Id.*, at para. 227. As already noted, Bastarache J. appears to conceive of enumerated grounds as broader than analogous grounds. In *Lavoie*, *supra*, note 60, he held that *Andrews*, *supra*, note 32, determined that non-citizens were a disadvantaged group as a matter of law, while the enumerated ground of age captured both the youthful group in *Gosselin*, *id.*, as well as the older disadvantaged group in *Law*, *supra*, note 2.

[86] *Gosselin*, *id.*, at para. 228.

[87] *Id.*, at paras. 237-238.

[88] *Id.*, at para. 243.

[89] *Id*.

be supported by genuine difference between claimants and beneficiaries: this was not present when considering the real position of those under 30 who had the same needs as those over 30. The potential difference between the groups based on the assumption that more of those under 30 lived with their parents was unsupported. The fact that the evidence showed that the presumptions guiding the legislature were factually unsupported and historically out-of-date, resulting in serious detriment to those affected, made it unnecessary to show actual stereotyping. A beneficial governmental purpose could not save the scheme. He felt that the class action authorization, based on proof of a group harmed on the same facts, should satisfy the need for proof of group disadvantage. He wrote that the inquiry into the scope and nature of the effect on the claimant should focus on the claimant and not the societal interests that the legislature was trying to secure because they were section 1 concerns. Here the issue of survival for the claimant was fundamental and one known by the government, and it was not trumped by a secondary long-term goal of improving self-sufficiency for the claimant group. He disagreed with the Chief Justice, who had used the deferential argument from *Law* that correspondence between law and need does not have to be perfect, by finding that the discrepancy in this case was far in excess of what the *Law* standard would tolerate.[90]

Justice Bastarache broached some broader concerns about constitutional doctrine. He theorized the difference between the effect of legislative under-inclusion in the analysis of the comparative section 15 right and the analysis of the non-comparative section 7 right (though he ultimately rejected the section 7 argument because the case did not engage the administration of justice).[91] The comparative nature of the section 15 equality right ensures that an improperly excluded group obtains the benefit that a proper comparison with another group shows that it should get. This analysis differed from the non-comparative right. He used the example of the non-comparative right to freely associate in section 2(d) that he had dealt with in *Dunmore v. Ontario (Attorney General)*[92] and earlier in *Delisle v. Canada (Deputy Attorney General)*[93] to explain. He

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[90] *Id.*, at para. 259, countering the Chief Justice's use of the point made in *Law*, *supra*, note 2, at paras. 105-106, in her reasons in *Gosselin*, *id.*, at para. 73. However, Iacobucci J. in *Law* does say the more disadvantaged the claimant group, the closer the correspondence must be (at para. 106).

[91] *Gosselin*, *id.*, at para. 217.

[92] [2001] S.C.J. No. 87, [2001] 3 S.C.R. 1016 (S.C.C.) (dealing with the exclusion of agricultural workers from the provincial labour scheme) discussed in *Gosselin*, *id.*, at para. 202.

[93] [1999] S.C.J. No. 43, [1999] 2 S.C.R. 989, at para. 25 (S.C.C.) (dealing with the exclusion of the RCMP from federal labour legislation).

had said in *Dunmore* that where a state specifically designs legislation to safeguard a constitutional right, under-inclusion that substantially impedes the exercise of that right by an excluded group may require a positive constitutional remedy. This was not present in Gosselin's case.[94] In his view, the government distinction did not substantially interfere with the claimant's right to security of the person because the workfare elements of the program assisted in finding work and could provide additional benefits.[95] The higher benefit for those over 30 did not reduce the potential of those under 30 to exercise their right to security of the person. The focus of the non-comparative right was on the group's ability to access the constitutional right, not to better benefit from the statutory scheme: that was the job of section 15. Although ultimately finding that the welfare scheme was unconstitutional, he refused to join in Arbour J.'s attempted re-writing of the Court's doctrine on section 7.

In *Hislop*,[96] Bastarache J. concurred in the Court's finding the exclusion of survivors of same-sex couples from the *Canada Pension Plan*[97] contrary to section 15. Justices LeBel and Rothstein for the majority held that the Court should limit the retroactive effect of its order because of the substantial change in its position in *M. v. H.*[98] from its ruling in *Egan*,[99] where the Court held that the exclusion of same-sex couples did not breach the Charter. Justice Bastarache thought that the denial of retroactive relief, a long-standing legal principle, was inappropriate in Charter cases, and that the normal remedial considerations should apply. Conflict with the Charter invalidated a law and:

> By attaching importance to changing social conditions, it makes *Charter* rights dependent on how the majority of Canadians perceive the claimants' rights. With respect, I cannot see why society's views of *Charter* claimants — especially in the context of vulnerable minorities — should be a factor for determining whether a *Charter* right was part of the Constitution in 1985, or whether it sprung into existence later and thereby be a basis for denying retroactive relief.[100]

In his view, *Egan* was not a sea change in the process of determining the status of same-sex relationships under the Constitution that ended

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94 *Supra*, note 83, at para. 220.
95 *Id.*, at para. 221.
96 *Supra*, note 13.
97 R.S.C. 1985, c. C-8.
98 *Supra*, note 47.
99 *Supra*, note 8.
100 *Supra*, note 13, at para. 143.

abruptly with the recognition of these relationships in *M. v. H*. Rather, he saw the Court's jurisprudence as part of a larger process by which the Court determined "the correct constitutional principles to be applied to legislative exclusions of same-sex couples".[101] Constitutional remedies were important. Nevertheless, reasonable reliance on the Court's earlier rulings, fairness to litigants and respect for Parliament's role and its good faith move to legislatively remedy the issue across federal statutes and policies after *M. v. H.* were important considerations in determining Charter remedies. In the end he agreed with his colleagues in limiting the retroactive effect of the remedy. While he was obviously unhappy from a principled Charter viewpoint, he felt compelled to acknowledge some of the realities of modern government.

X. Balancing Rights in the Administrative Context

Some cases show that Justice Bastarache's usual choice of liberal principles to advance the values of human dignity, liberty and equality was tempered with principles that supported traditional or collective social values. His approach in two cases shows him to make rational choices consistent with a pluralistic, liberal society.

He wrote the majority reasons of the Court with Iacobucci J. in *Trinity Western University v. British Columbia College of Teachers*,[102] rejecting a decision of the British Columbia College of Teachers refusing to approve a proposal of Trinity Western to take full responsibility for its teacher training program. The refusal was based on the perception that graduates of the Trinity Western program would not be able to teach in a diverse school system because all members of the evangelical program had to subscribe to standards prohibiting biblically condemned practices, such as homosexual behaviour, that the College found discriminatory and contrary to its public policy mandate. Justices Bastarache and Iacobucci wrote that the issue at the heart of the appeal was how to reconcile the religious views of the Trinity Western community with the equality concerns of students, parents and society in the British Columbia public school system.[103] That was to be done by delineating the scope of the rights involved.[104] They drew the line between belief and conduct. There

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101 *Id.*, at para. 157.
102 [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.).
103 *Id.*, at para. 28.
104 *Id.*, at para. 29.

was no evidence of discriminatory conduct by a Trinity Western graduate or of a related future risk to the school system. Future discriminatory conduct would be subject to sanction by the College in any event. The College had acted on irrelevant considerations and its decision was overruled.

In a more traditionalist vein, he signed on to the dissenting reasons of Gonthier J. in *Chamberlain v. Surrey School District No. 36*,[105] who held that it was reasonable for a local school board to refuse to allow teachers to use three books aimed at portraying children of same-sex couples as morally acceptable families to children in kindergarten and grade one. The local school board had weighed the views of many parents who did not want their young children exposed to views contrary to their religious beliefs. Justice Gonthier emphasized the primacy of parental right in determining the moral development of children. He balanced parental and religious rights with what he thought to be a vague case of discrimination: the children would learn about human sexuality when necessary and, in any event, in later grades.

XI. SECTION 15 AND CONFLICT WITH ABORIGINAL RIGHTS

Kapp[106] was a prosecution of non-Aboriginal claimants who alleged in their defence that the extra 24 hours given to Aboriginal fishers under the Aboriginal Fishing Strategy breached their equality rights in the context of the commercial fishery. Justice Bastarache concurred with the majority in its modifications to the *Law* standard and in the result that the claimants' argument should be rejected.

However, he based his reasons for decision on an argument that shows a collectivist orientation: that section 25 provided a complete answer to the section 15 claim on the ground that the Aboriginal fishery was "another right" pertaining to the Aboriginal peoples of Canada. In his view, section 25 is a shield against the application of the Charter where it would diminish the distinctive, collective and cultural identity of an Aboriginal group.[107] It is not absolute, in that it is subject to sexual equality in section 35(4) of the *Constitution Act, 1982*.[108] Further it applies only where Charter rights conflict with Aboriginal rights. Thus,

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105 [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

106 *Supra*, note 35.

107 *Id.*, at para. 89.

108 Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

only laws impairing native rights will be affected and not those with only incidental effects on Aboriginal people.[109] He also notes that section 25 rights are not constitutionalized and can be taken away, presumably referring to "other rights".[110] Generally, "other rights" would include a significant amount of law:

> Laws adopted under the s. 91(24) power would normally fall into this category, the power being in relation to the aboriginal peoples as such, but not laws that fall under s. 88 of the *Indian Act*, because they are by definition laws of general application. "[O]ther rights or freedoms" comprise statutory rights which seek to protect interests associated with aboriginal culture, territory, self-government, as mentioned above, and settlement agreements that are a replacement for treaty and aboriginal rights. But private rights of individual Indians held in a private capacity as ordinary Canadian citizens would not be protected.
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> The inclusion of statutory rights and settlement agreements pertaining to the treaty process and pertaining to indigenous difference is consistent with the jurisprudence of this Court.[111]

Applying the purpose-doctrine approach to implementing the Constitution, having determined that this is the purpose of section 25, Bastarache J. then considers the doctrine needed to implement it:

> There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.[112]

Justice Bastarache found a *prima facie* breach of section 15(1) because a benefit was conferred on Aboriginal people not given to non-Aboriginal fishers. This established a conflict with an Aboriginal right. He then found that the early start given to Aboriginal fishers in the licence is an "other right" for section 25 purposes. It was founded on the unique connection between Aboriginal communities and the fishery. These had been the subject of litigation and treaty right and were part of

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109 *Supra*, note 35, at para. 97.
110 *Id.*, at para. 100.
111 *Id.*, at paras. 105 and 106.
112 *Id.*, at para. 111.

the reconciliation of interests in the Aboriginal Fishing Strategy.[113] He also found a traditional basis for resolving constitutional conflicts by noting that the right in question was "totally dependent on the exercise of powers given to Parliament under section 91(24) of the *Constitution Act, 1867*"[114] to legislate for the benefit of Indians, which cannot be overridden by section 15 of the Charter. This was a real conflict between this "other right" and section 15 of the Charter to which the latter gives way.

However, the majority had the last word on section 25, at least to the extent of undermining the definitive position taken by Bastarache J. But to the extent that his reasons demonstrate a choice of principles that protect group rights, we might find that consistent with the group nature of the linguistic rights that so engaged him.

XII. SECTION 1

Justice Bastarache pursued his interest in the deeply contextual nature of section 1 analysis in a lengthy exegesis of the factors that apply in justification of breaches of section 15 in *M. v. H*. His highly principled approach to justification appears to be driven by his view, stated at the outset of his section 1 reasons, that the case involved more than the status of same-sex couples in the family law regime, but the broader question of the scope of deference to legislative policy-making as determined by his theory of the relationship between judge and legislator. He was quite aware that the law-making task of both the legislatures and the courts in some areas could be perceived as "an irreducible struggle".[115] However, he was confident that the courts were to carry out their duties in cooperation and dialogue with the legislature. That cooperation created responsibilities for judges, that meant that the courts owed legislatures an exacting examination of both its subjective intent and its law's social context.

His section 1 reasons in *M. v. H.* commence with a warning that the important issue of deference to legislative choice cannot be determined by the simple dichotomization of legislation into that which pits the state against the individual versus that which mediates the interests of various groups in society. Rather, it requires an exegetical probe of the contextual factors that have to be considered in determining the issue of deference. The intensity of his inquiry shows just how important he

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113 *Id.*, at paras. 119 and 120.
114 *Id.*, at para. 121.
115 *M. v. H.*, *supra*, note 47, at paras. 328, 286.

thought the question of deference was to the proper constitutional role of the judiciary when it sat in judgment on legislative policy: too much deference underemphasized the judicial role in determining the legal question of constitutionality, while too little deference could demonstrate a constitutionally unwarranted judicial hegemony. He returned to this theme after his review led him to the conclusion in *M. v. H.* that section 1 should be applied strictly, without deference. He stated that a careful examination of the legislators' subjective intent is the way to minimize the judicial intrusion into the role of the legislature to express the will of the community and that judges must ensure that the democratic will of the legislators be given the clearest expression possible, within Charter limits.[116]

Justice Bastarache's section 1 reasons in *M. v. H.* also show his underlying respect for the basic Enlightenment liberal principles that undergird Charter rights.[117] He is concerned about the cost in autonomy of the mandatory legislative imposition of marital obligations on couples who have not chosen to assume them by marriage (while noting that this option was not open to same-sex couples at the time). At the same time he is concerned about the inequality arising in gendered relationships and those left out of relevant family law.

His section 1 analysis starts with an objective examination of the social context of the impugned legislation. With a warning that judges should take care when relying on social science evidence, he concludes that its preponderance shows that same-sex relationships do not create the power imbalance characteristic of opposite-sex relationships. However, at the same time, he notes that there is a growing recognition of the family status of same-sex relationships in society and in government policy and the prevalence of discrimination based on sexual orientation.

His description of the context of the legislation then leads to a determination of what he considered the initial section 1 question: how much should the courts defer to the legislature based on contextual considerations?[118] Justice Bastarache had earlier emphasized the importance of looking at this question first in order to know what type of proof should be expected from the government, as well as being relevant to all

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[116] *Id.*, at para. 328.

[117] *Id.*, at paras. 299-301.

[118] Justice Iacobucci, writing for the majority, disagreed with this approach of placing the deference issue at the beginning of the s. 1 inquiry, finding that it was more appropriate to consider it where it became relevant to an *Oakes* inquiry, *id.*, at para. 80; *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

of the parts of the judicial duty to apply the *Oakes* justification standard.[119] In *M. v. H.*, he states that the point of this inquiry into deference is to determine whether, in the face of evidence showing that same-sex relationships do not usually create gender inequality, but do in some cases, the Court has to accept the legislature's decision about whom to include in the family support regime or whether it can proceed to remedy the problem as it appears from the social context of the law. Thus, his concern with deference seems to be deeply rooted in his conception of the proper resolution of the court/legislature dialogue model.

Justice Bastarache then embarks on a closer look at the deference issue in the substantive equality context, considering many of the factors that are discussed above in connection with the theory about how judges implement constitutional meaning through doctrine, in this case, the *Oakes* standard's purpose of determining whether breaches of the Charter are justified. Ultimately, his view that the Court need not defer to legislative choice in *M. v. H.* was based on a number of such factors. The nature of the interest affected was fundamental. He accepted the argument that the exclusion of same-sex couples perpetuated their legal invisibility, though he does suggest that the best solution to the support issue for them would be legislation that better corresponds to their needs and expectations.[120] This is an interesting example of how important the distributive power of the law was in requiring the correspondence of law to group need for Bastarache J. The vulnerability of the group is another factor, which could be ambiguous in some cases suggesting deference, but was not in this case. The complexity of the overall issue of making normative social changes based on a recognition of same-sex couples suggested more deference: who is in the best place to make the decision from an institutional perspective? He recognized that the issue before the Court was only a small piece in a much larger web of family law in which judicial tinkering might bring about unfortunate unintended consequences. This increased the potential cost of judicial error. However, in this case, he thought that the issue of support obligations for same-sex couples was severable from the larger legislative web. Further, there were no particular administrative or financial priority-setting issues that might weigh in favour of deference to the legislature based on institutional competence concerns. Interestingly, he suggests that the

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[119] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877, at paras. 87-88 (S.C.C.).

[120] *M. v. H.*, *supra*, note 47, at para. 308.

governmental decision-making process affects deference: the more open and democratic the process, the more deference it is presumptively entitled to. In this case, however, the legislative record showed no democratic consideration given to the right of this group to equal concern and respect. His final consideration was the role of the legislators' moral judgment in social policy. He thought that moral judgment might favour supporting the traditional family in some cases: a peek at his thinking about what might be considered conservative principles. However, any internal tension that this might have created for Bastarache J. was not a factor here, because he thought that the ascription of status to same-sex couples did not create any hardship for traditional families and, in fact, supported family formation.

Justice Bastarache's conclusion that little deference was due to the legislators in this case meant that the *Oakes*[121] standard should be applied strictly. As noted above, this meant judges owed legislators significant effort in attempting to determine their subjective legislative purpose. Judges had to carry out a careful review of the legislative record and the resulting legislation. "The perspective must be that of the political actor."[122] He thought that this was particularly true in section 15 cases where legislative action may be based on contested social phenomena, misapprehensions of the circumstances of a group or antipathy towards it. However, the possibility that these factors might have been present in the minds of legislators — factors that would undermine any justification of discrimination — meant that there should be an additional, objective element to the examination of legislative purpose, which would be found by a careful examination of the social context of the impugned legislation. Presumably, he thought that this would identify the zone of contestation between legislative intent and any gap between it and social reality as well as any misapprehensions or antipathies about or toward the excluded group. Because of the potential existence of gaps between legislative intent and social reality, he concluded that where the subjective and objective narratives of purpose and need are "manifestly inconsistent"[123] — presumably where legislators have failed to explore and properly respond to the social environment of their legislative action within their zone of deference because of these considerations — then subjective legislative history should give way to objective social reality.

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121 *Supra*, note 118.

122 "Interpretation of Human Rights", *supra*, note 11, at 5.

123 *M. v. H.*, *supra*, note 47, at para. 324.

Digging deeper, he noted that determining the legislative purpose for the impugned legislation in any given case may be difficult in section 15 cases especially because the legislators' purpose for creating the legislative scheme as a whole may not disclose why the claimant group was excluded. A judge had to determine not only the purpose of the overall legislative scheme — particularly important in section 15 cases because it will rarely be discriminatory itself[124] — but also the purpose of the impugned omission, which is the real limitation of rights to be justified. Because of the relational nature of the two purposes, the legislative history should be examined as precisely as possible to ascertain both purposes. He notes that failure to find the legislators' purpose for the impugned exclusion could mean a failure of the rational connection element of the section 1 justification test, unless that purpose could be logically deduced from the overall purpose. I think that because Bastarache J. was so concerned in his thinking on section 15 about the correspondence of the law to need, he thought that there would naturally be a tension between the overall purpose and the exclusion that would lead to a failure of rational connection.

His concern with the care that should be taken in determining the legislative purpose in *M. v. H.* showed in Bastarache J.'s unhappiness with the Court of Appeal's determination of legislative purpose. He thought it oversimplified. The purpose had been reduced by that court to the recognition of intimate relationships and the avoidance of a drain on the public purse. He thought that a closer look was needed because this did not offer a justification for the legislation as it focused on only one of the characteristics of the class benefited by it. In his view, the primary purpose of the legislation demonstrated by the legislative debates was remedying the economic disadvantage of women in common law relationships and subsidiarily remedying their economic position and their resort to public assistance.[125] He referred to the concurring reasons of McLachlin J. (as she then was) in *Miron* that referred to the same disadvantage.[126] The fact that the text of the legislation allowed men to apply for support was due to the desire of the government to use gender-neutral language and not to extend the right to sue for support to

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[124] *Id.*, at para. 333. Similarly, in *Egan*, *supra*, note 8, Iacobucci J., dissenting, writes at para. 189: "Moreover, as noted by Lamer C.J. in *Schachter v. Canada*, [[1992] S.C.J. No. 68, [1992] 2 S.C.R. 679], at p. 721, '[i]t will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose'."

[125] *Id.*, at paras. 339-340.

[126] *Supra*, note 8, at para. 97.

everyone in intimate relationships. Evidence of male dependency was lacking. A look at the entire legislative structure, including other related statutes, showed its purpose was to deal with the traditional family (apparently including opposite-sex common law partners): the equality of spouses, the protection of children and parents. The family scheme fit into a broader web of family-oriented statutes dealing with the traditional family.

However, his careful review of legislative history did not reveal any evidence that the legislators turned their minds to a specific purpose for excluding same-sex couples. It disclosed only a concern for gender inequality in "traditional" relationships, not for economic inequality in all intimate relationships. The lack of consideration given to same-sex couples suggested that the legislators did not consider them families in the traditional sense. That and the failure of proposed amendments that would have extended these rights to same-sex couples[127] was evidence that the original purpose concerning gender inequality was the real, subjective purpose of the legislators. Presumably this was evidence of either a failure of democracy or a misapprehension of social needs.

The evidence did show that women and children were still vulnerable in common law relationships and that the number of children in such relationships was increasing. Overall, he thought that there was a pressing and substantial purpose for protecting women and children in traditional and gendered non-traditional families of some permanence.[128] But in his view, the justification for this limited intervention "affecting the autonomy of heterosexual couples"[129] did not justify the exclusion of all other family relationships. The government's purpose for the under-inclusion, which he summarized as excluding classes not generally suffering gender imbalance suggesting no need to limit their autonomy,[130] was not rationally connected to the objective of achieving the "objective of eradicating economic dependency within families".[131] There was no evidence that the inclusion of same-sex relationships would cause difficulties. Thus, there was no pressing and substantial objective for the exclusion of same-sex couples who experienced the same need as opposite-sex relationships, though in reduced numbers.[132]

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127 *Equality Rights Statute Law Amendment Act, 1994, Bill 167*.
128 *M. v. H.*, *supra*, note 47, at para. 354.
129 *Id*.
130 *Id.*, at para. 355.
131 *Id*.
132 *Id.*, at para. 356.

Justice Bastarache's strong commitment to the equality principle in the Charter led him to ask whether the purposes of the exclusion were consistent with that principle.[133] They were not.

Also, throughout his section 15 decisions, he insisted on the need to keep the section 15 and section 1 analyses separate. He wrote in *Lavoie*:

> By contrast, the government's burden under s. 1 is to justify a breach of human dignity, not to explain it or deny its existence. This justification may be established by the practical, moral, economic, or social underpinnings of the legislation in question, or by the need to protect other rights and values embodied in the *Charter*.[134]

XIII. ANTI-DISCRIMINATION LEGISLATION

The right to equality in Canada is enforceable against both private and public bodies through human rights legislation found in every jurisdiction prohibiting discrimination in employment and services.

The Supreme Court has dealt with many jurisdictional issues recently, steadily expanding the number of bodies that can apply human rights legislation, increasing access to anti-discrimination prohibitions. In *Tranchemontagne v. Ontario (Director, Disability Support Program)*,[135] Bastarache J. wrote that "in *Charette*[136] I noted how allowing many administrative actors to apply human rights legislation fosters a general culture of respect for human rights in the administrative system".[137] In *Tranchemontagne*, he held that a Social Benefits Tribunal had the exclusive power to apply the Ontario *Human Rights Code*[138] to determine whether social assistance legislation was in conflict with the Code rendering certain of its provisions inoperative in the case. He developed a complex argument for finding that the provision of the legislation that says that the Tribunal cannot decide the constitutionality of legislation did not oust the effect of the Code's primacy provision because the latter did not result in a constitutional review but in a matter of statutory interpretation, determining which statute shall apply in a given situation. In *Québec (Commission des droits de la personne et des droits de la*

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133 *Id.*, at para. 354.

134 *Supra*, note 60, at para. 48.

135 [2006] S.C.J. No. 14, [2006] 1 S.C.R. 513 (S.C.C.) [hereinafter "*Tranchemontagne*"].

136 *Québec (Attorney General) v. Québec (Human Rights Tribunal)*, [2004] S.C.J. No. 35, [2004] 2 S.C.R. 223 (S.C.C.) [hereinafter "*Charette*"].

137 *Supra*, note 135, at para. 39.

138 R.S.O. 1990, c. H.19 [hereinafter "Code"].

jeunesse) v. Québec (Attorney General)[139] he wrote for the dissent, arguing that the exclusive arbitral jurisdiction over grievances given by legislation in Quebec meant that an arbitrator rather than a human rights tribunal should deal with a complaint of discrimination about the terms of a collective agreement. In *Charette*,[140] he wrote for a majority, holding that the Quebec legislature had given the Commission des affaires sociales exclusive jurisdiction to deal with an allegation of discrimination in entitlement conditions for social assistance benefits and not the human rights tribunal.

In *Canada (Human Rights Commission) v. Canadian Liberty Net*[141] he wrote the majority reasons for holding that the Federal Court of Canada had the power to issue an interim injunction to prevent the spread of hate messages under the *Canadian Human Rights Act*[142] pending the final disposition of the case by the Canadian Human Rights Tribunal.

On substantive matters, he wrote joint reasons with Iacobucci J. in *B v. Ontario (Human Rights Commission)*[143] reasoning that the concept of marital and family status in the Ontario *Human Rights Code*[144] was broad enough to cover the situation where an individual's employment was terminated because of allegations his wife and child made about his employer, his wife's brother. They reasoned that human rights legislation protects individuals from discrimination based on grounds which in *B* were relational by their very nature. Drawing on the purpose of section 15 doctrine, they refined and related the individual and collective nature of the right to be free of discrimination. In applying their theory to facts, they found that the termination based on family identity regardless of the merits as "precisely the kind of conduct which the Code aims to prevent".[145]

Justice Bastarache also wrote the reasons for the majority in *Honda Canada Inc. v. Keays*,[146] a wrongful dismissal case that engaged principles of the Code. Keays was terminated after failing to meet with Honda's doctor, who had been engaged to evaluate his chronic fatigue syndrome after the employer became concerned that his own doctor's notes did not

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139 [2004] S.C.J. No. 34, [2004] 2 S.C.R. 185 (S.C.C.).

140 *Supra*, note 136.

141 [1998] S.C.J. No. 31, [1998] 1 S.C.R. 626 (S.C.C.).

142 R.S.C. 1985, c. H-6.

143 [2002] S.C.J. No. 67, [2002] 3 S.C.R. 403 [hereinafter "*B*"].

144 These definitions are as follows in s. 10(1): "'family status' means the status of being in a parent and child relationship"; … 'marital status' means the status of being married, single, widowed, divorced or separated and includes the status of living with a person in a conjugal relationship outside marriage".

145 *B*, *supra*, note 143, at paras. 60-61.

146 [2008] S.C.J. No. 40, [2008] 2 S.C.R. 362 (S.C.C.) [hereinafter "*Keays*"].

satisfactorily explain his lengthy absences from work. The case focused on the damages issue. The trial judge had held that the employer had breached the Code, which was an actionable wrong that supported punitive damages. However, Bastarache J. upheld the ruling in *Seneca College of Applied Arts and Technology v. Bhadauria*[147] that discrimination did not create a common law cause of action, but that claims of discrimination were comprehensively dealt with in the Code and did not create an actionable wrong. He also found that the trial judge erred in finding that requirement to provide doctor's notes as part of the accommodation program that permitted disabled employees to take longer, excusable time off was discriminatory. He also accepted that the need to monitor the absences of employees who were regularly absent was a *bona fide* work requirement based on the nature of the employment contract to provide work for payment.[148] Showing the pragmatic side of judging, while upholding long-standing anti-discrimination law principles, he found others tempered by the terms of basic employment contracts in the workaday world.

XIV. CONCLUSION

In the equality field, Justice Bastarache was a lawyer's judge. He worked within established legal doctrine to refine it to bring it closer to his perception of the demands of the Charter. His perception of the equality right and the power of the law as an instrument of distributive justice led him to strongly favour the principle that the law should correspond to the actual needs of the legal subject. He tended to find a key driver for his findings of discrimination such as the failure of democratic representation in *Corbiere*,[149] the failure to provide for the needs of same-sex couples on the breakdown of their relationship in *M. v. H.*[150] and the lack of connection between merits and citizenship preference in *Lavoie*.[151] His rulings adhered strongly to the classical liberal principles of liberty and equality. The claim of discrimination in marital property division rules was trumped by the liberal concern for individual autonomy of the members of a common law relationship in

147 [1981] S.C.J. No. 76, [1981] 2 S.C.R. 181 (S.C.C.).
148 *Keays*, *supra*, note 146, at para. 71.
149 *Supra*, note 51.
150 *Supra*, note 47.
151 *Supra*, note 60.

Walsh.[152] At the same time that he acknowledged the principles by which the law supported the traditional family, he distanced himself from the concept of community responsibility that would have found same-sex couples to be a threat to the hegemony of the opposite-sex family. He saw the need for a highly contextualized approach to the justification of breaches of section 15 in applying section 1 in a way that seems to have been based on a well-theorized conception of the constitutional roles of judges and legislators. He wrote that substantive equality is the norm for the interpretation of Canadian law.

His anti-discrimination cases tended to extend the jurisdiction of tribunals to apply these laws with the expected result that it would foster a climate of respect for human rights. He arrived at a logical extension of the grounds of marital and family status that had been latent in the law for some time, while accepting some legal and pragmatic limits on their scope.

Overall, he was a judge who advanced the values of the Charter within a well-thought-out conception of how our democracy works.

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[152] *Supra*, note 77.